No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Amicus curiae represents public safety employees who serve and protect citizens and their communities across the nation.[1] The International Association of Fire Fighters ("IAFF") is an organization representing more than 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF affiliates protect the lives and property of over 85 percent of the population in nearly 6,000 communities in every state in the United States. The IAFF's mission includes improving the working conditions of fire fighters and emergency medical services employees, as well as advancing the effectiveness, general health, and well-being of those personnel through collective bargaining, labor agreements, and other appropriate means. The IAFF seeks to promote the welfare of fire fighters and other emergency responders with respect to health and safety, education, training, protective gear and equipment, and other terms and conditions of employment.

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[1] Pursuant to Rule 37, counsel for Petitioner and counsel for Respondents have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

This case addresses the constitutionality of "agency fees," also known as "fair share fees," which require public employees who benefit from union representation to pay their fair share of the costs of negotiating and administering collective bargaining agreements. Many IAFF affiliates negotiate collective bargaining agreements containing fair share fee arrangements.

SUMMARY OF ARGUMENT

Fire fighters, emergency medical services employees, and other first responders routinely face grave danger while on duty, working through the most extreme hazards to protect their communities. Through collective bargaining, the IAFF and its local affiliates work to reduce on-the-job hazards and risks—for union members and non-members alike. Indeed, not only does properly funded collective bargaining protect the safety of both members and non-members, in doing so it serves the essential government interest in providing the most safe, effective, and efficient fire protection and rescue services possible. Collective bargaining and union representation are therefore vital for not only public safety employees but the public at large.

For 40 years, state and local governments have relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to establish collective bargaining systems that grant the exclusive bargaining representative the ability to collect agency fees from non-members to cover the costs of collective bargaining because this structure serves essential government interests in attracting and retaining high quality personnel and ensuring the highest possible level of service to the public.

Fair share fees play a significant role in maintaining a stable collective bargaining system where the union serves as the exclusive representative of *all* employees, and non-members benefit substantially from the union's collective bargaining efforts. This long-established structure also fosters a productive relationship between the employer and the union. Public safety unions seek to obtain important health and safety protections through collective bargaining, which include adequate staffing levels, essential training and equipment, additional specialized training and equipment where regional issues demand it, employee wellness programs, and other health and safety measures, to protect fire fighters, emergency medical services personnel, and the citizens they serve. It is imperative that public safety unions fairly receive adequate funds through membership dues and fair share fees to best protect both public safety employees and their communities.

Abood has been settled precedent *for more than 40 years*. The Court has repeatedly reaffirmed and clarified the principles set forth in *Abood*, and that well-reasoned decision is now firmly embedded in the Court's First Amendment jurisprudence. In addition, *amicus curiae* has significant reliance interests in *Abood* and the system of collective bargaining and fair share fees established pursuant to that decision, and the Court's precedents and the principle of *stare decisis* militate against overturning *Abood* and imposing a ban on the collection of fair share fees.

ARGUMENT

The history of the IAFF—from its formation in 1918 from a loose collection of local organizations through the present—is one marked by tremendous improvements in the welfare, health, and safety of this nation's emergency responders and the public they serve. Since the Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the IAFF's local organizations—with the benefit of fair share fees—have seen not only continued progress, but, importantly, a labor peace of unprecedented length and resilience.

For decades now, state and local governments have relied on *Abood* to construct collective bargaining systems calibrated to promote stable labor relations, thereby encouraging cooperation and efficiency in their public services. Due to the dangers of public safety jobs, as well as the importance of the efficient operation of emergency services, the government interest in stable and effective collective bargaining in the public safety context is especially acute.

State and local governments across the nation have reached the careful, reasoned policy judgment that serving this critical government interest requires that public safety be supported by agency fees in addition to membership dues. These additional resources permit public safety unions to secure much needed health and safety protections for their bargaining units, benefitting not only union members, but non-member coworkers and the communities they serve. Nowhere has the necessity of fair share fees been more visibly demonstrated than in California's recent battles with its historically devastating wildfires. Only with the benefit of fair share fees could California's IAFF locals have

bargained for and implemented the improved training, equipment, and staffing levels they needed to safeguard the lives and homes of the citizens in the path of those wildfires. In addition, with the financial support of fair share fees, IAFF affiliates are able to secure better working conditions through bargaining and administering labor/management agreements, thus greatly contributing to peaceful and productive labor relations between emergency responders and government employers. California—and indeed any state and local government—have a vital interest in achieving these important goals.

Upsetting this long-established system would not only thwart these important government interests and be fundamentally unfair to dues-paying union members whose dues must support the interests of the entire bargaining unit by law, it would turn *stare decisis* on its head. In *Abood*, which permits the indispensable collective bargaining framework described above, the Court reached a constitutional balance that has been embedded into its First Amendment jurisprudence for more than four decades. If *Abood* and its progeny are overruled despite the longstanding and important reliance by state and local governments across the nation on fair share fees, the doctrine of *stare decisis* will be reduced to myth.

I. Public Safety Unions Must Be Fairly Funded to Serve and Protect the Interests of Fire Fighters, Paramedics, Emergency Response Personnel, and the Communities They Serve.

Fully funded collective bargaining and union representation provide critical support to fire fighters, emergency medical services employees, and emergency response personnel, and they are historically essential to a cooperative and productive relationship between those personnel and their government employers. The Court in *Abood* underscored the "important contribution of the union shop to the system of labor relations," and the significance and "desirability of labor peace." *Abood*, 431 U.S. at 222, 224. The Court further determined that the desirability for labor peace "is no less important in the public sector." *Id.* at 224. Indeed, in the public safety sphere, the interest in labor peace and effective collective bargaining is of even greater importance – both to public safety employees and to the government and communities they serve.

In those jurisdictions where fire fighters may engage in collective bargaining,[2] state and local governments overwhelmingly find that the collective bargaining structure, including the ability of the exclusive representative to collect fair share fees from non-members, allows state and local governments to advance their interests in effective emergency services. By collectively bargaining with *one* employee representative, and preventing free riding

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[2] About half of the states, including Illinois, allow for collective bargaining and fair share arrangements. *See, e.g.*, Ill. Comp. Stat. Ann. 315/6(e).

on the union's obligation to represent *all* members of the bargaining unit, public employers serve fundamentally important government interests. Every element of the collective bargaining structure, including the fair share fees that financially support public safety unions, is crucial to a government's ability to deliver efficient fire and emergency medical services to its citizens. Governments recognize that collective bargaining with public safety unions aligns with the essential government interest of protecting not just the first responder employees, but also the citizens they safeguard.

Sound public policy demands, as state legislatures have recognized, that public safety unions be allowed to collect fair share fees due to the nature of their work. At least two state legislatures, Wisconsin[3] and Michigan,[4] have recognized that public safety unions

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[3] Wisconsin law provides, "A general municipal employee has the right to refrain from paying dues while remaining a member of a collective bargaining unit. A public safety employee or a transit employee, however, may be required to pay dues in the manner provided in a fair-share agreement . . . ." Wis. Stat. § 111.70(2).

[4] Michigan law declares that "an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following . . . Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative." Mich. Comp. Laws § 423.210(3)(c). Michigan law, however, carved out public safety employees from this mandate by stating, "Subsection (3) does not apply to any of the following: A public police or fire department employee . . . ." Mich. Comp. Laws § 423.210(4)(a)(i). State troopers and sergeants are also exempt. Mich. Comp. Laws § 423.210(4)(a)(ii). Michigan law also provides that "[a]ny person described in subdivision (a), or a labor organization or bargaining representative representing persons described in

necessarily require the ability to collect fair share fees, due to the critically important and dangerous work performed by the employees they represent.

While Petitioner seeks to overturn *Abood* based on the circumstances of public employee unions that represent primarily non-public safety employees—and, notably the Respondent AFSCME Council 31 represents numerous public safety workers, such as correctional officers, local jailers and police officers—Petitioner has not taken into account the unique interests that fire fighters and EMS workers have in a collective bargaining system with fair share fees. Petitioner instead requests that the Court interfere with states' reasoned policy judgments, substituting its own uniform judgment for the state legislatures' careful balancing of the particular public policies most pertinent to the citizens they serve. States are in the best position to assess whether collective bargaining and agency fees serve vital government interests in attracting and retaining a stable, experienced, and qualified workforce and in improving the services provided to the public.

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subdivision (a) and a public employer or this state may agree that all employees in the bargaining unit shall share fairly in the financial support of the labor organization or their exclusive bargaining representative by paying a fee to the labor organization or exclusive bargaining representative that may be equivalent to the amount of dues uniformly required of members of the labor organization or exclusive bargaining representative." Mich. Comp. Laws § 423.210(4)(b).

A. Fair Share Fees Are Necessary to Fund Efforts to Obtain Essential Health and Safety Protections for All Bargaining Unit Members that IAFF Affiliates Are Obligated by Law to Represent.

Public safety unions often have different negotiating priorities than many other public employee unions. In addition to negotiating wages, which are important to attract and retain top quality first responders, public safety unions like IAFF affiliates also focus their limited resources on protecting the health and safety of their bargaining unit members. Those protections, in addition to serving the interests of the fire fighters and emergency medical services employees themselves, allow them to better serve their communities, thereby fulfilling a critical government interest.

Indeed, not all states have laws regulating fire fighter health and safety, and some states that have enacted such laws do not have meaningful mechanisms to enforce them. Instead, many states have placed the burden on public safety unions to bargain for and enforce these important protections. Adequately and fairly funding public safety unions through membership dues and fair share fees is, therefore, essential to allow unions the opportunity to secure these protections, for the benefit of their members, their non-member coworkers, and for the community as a whole.

There are numerous collective bargaining priorities specific to the work performed by fire fighters and emergency medical services employees, and due to space constraints, the IAFF cannot discuss every one of them. Instead, highlighted here are a few significant priorities to which IAFF affiliates often

allocate their resources to illustrate the significance of collective bargaining, including the collection of fair share fees, to public safety employees and how fairness requires that a union's bargaining efforts, which benefit *all* employees, be adequately funded.

i. Adequate Staffing Levels and Training For All Bargaining Unit Members.

Maintaining sufficient staffing levels to ensure that fire fighters and rescue service personnel can efficiently respond to emergencies is a significant bargaining priority for IAFF affiliates. Decreased staffing levels result in a loss of jobs, loss of life, a decline in the safety of fire fighters and emergency response employees, and a substantial decline in the safety of the community. The National Fire Protection Association (NFPA)—a nonprofit organization and the leading authority on fire safety—recommends that the minimum staffing levels for a fire engine company to perform effective fire suppression tasks is four employees per fire apparatus. NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1710: STANDARD FOR THE ORGANIZATION AND DEPLOYMENT OF FIRE SUPPRESSION OPERATIONS, EMERGENCY MEDICAL OPERATIONS, AND SPECIAL OPERATIONS TO THE PUBLIC BY CAREER FIRE DEPARTMENTS, ch. 5.2.3 (2016 ed. 2015).

When fire fighters arrive at the scene of a fire, they must simultaneously perform multiple critical tasks, which include establishing the water supply, deploying an initial attack line, ventilating, performing search and rescue, and instituting a Rapid Intervention Crew (a standby crew tasked with immediately rescuing fire fighters in trouble). With more fire fighters on the emergency scene, these

tasks are performed more quickly, which better protects citizens' lives and property. One study found that a four-person crew completed the necessary tasks an average of 5.1 minutes faster (which is nearly 25% faster) than a three-person crew when operating at structure fires for one-, two-, or three-family dwellings. NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, REPORT ON RESIDENTIAL FIREGROUND FIELD EXPERIMENTS 10 (Apr. 2010). While five minutes may not seem like a lot of time, when responding to a fire, every second is critical. Rooms with modern construction and home contents generally transition to flashover—that is, simultaneous ignition of all combustible materials in a room—in under five minutes. Stephen Kerber, *Analysis of Changing Residential Fire Dynamics and Its Implications on Firefighter Operational Timeframes*, FIRE TECH. (Oct. 2012).

Fires burn faster today due to modern building construction, larger homes, more open floor plans, and home contents increasingly constructed with synthetic materials, and it is more imperative than ever to get water on the fire as soon as possible to prevent the loss of life and property. *Id.* In addition, if a fire fighter is in trouble, it is critical for the rescue crew to minimize the amount of time a fire fighter is in danger. If staffing levels are not sufficient, then the rescue crew may be assigned fire fighting duties at the scene that hamper their ability to immediately respond to a downed fire fighter, which needlessly endangers the lives of fire fighters.

In fact, inadequate staffing has been cited as a major contributing factor to emergency responses that resulted in fire fighter fatalities. In 2011, two IAFF Local 798 members in San Francisco tragically

lost their lives in the line of duty while fighting a residential fire. The National Institute for Occupational Safety and Health (NIOSH), the federal agency responsible for conducting investigations of fire fighter line-of-duty deaths, found that in this incident, staffing levels were not adequately maintained, and recommended that the Fire Department maintain sufficient staffing levels to prevent similar fire fighter deaths in the future. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, A SUMMARY OF A NIOSH FIRE FIGHTER FATALITY INVESTIGATION: A CAREER LIEUTENANT AND FIRE FIGHTER/PARAMEDIC DIE IN A HILLSIDE RESIDENTIAL HOUSE FIRE – CALIFORNIA 21 (Mar. 1, 2012).

Similarly, in 2014, two IAFF Local 718 members in Boston, Massachusetts, perished tragically while fighting a fire in a four-story brownstone. After investigation, NIOSH determined inadequate staffing to be one of the key contributing factors to the incident, and recommended ensuring in the future that staffing levels are commensurate with the tactical hazards of the densely populated, urban environment. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, A SUMMARY OF A NIOSH FIRE FIGHTER FATALITY INVESTIGATION: LIEUTENANT AND FIRE FIGHTER DIE AND 13 FIRE FIGHTERS INJURED IN A WIND-DRIVEN FIRE IN A BROWNSTONE – MASSACHUSETTS 1, 49-51 (Mar. 2, 2016).

IAFF locals in fair share states are better able to secure adequate staffing levels, which protect all employees, because they can properly fund bargaining efforts. For example, IAFF Local 2, in Chicago, Illinois, which has the benefit of fair share fees, has negotiated a minimum staffing provision

that ensures safe staffing levels for all trucks, engines, squad companies, HazMat units, command units, and ambulances. Likewise, IAFF Local 1619 in Prince George's County, Maryland, which also has a fair share agreement, obtained adequate staffing levels through collective bargaining by successfully incorporating into their contract for each fire station the NFPA-recommended minimum staffing level of four career personnel. In addition, IAFF Local 42 in Kansas City, Missouri, which also collects fair share fees from non-members, negotiated a labor agreement providing that fire apparatus shall be staffed in compliance with the NFPA standards.

Adequate training is another important bargaining priority funded by fire fighter unions to the benefit of all employees. IAFF affiliates spend their resources on obtaining adequate training through negotiations with the employer, to the benefit of all employees, and fair share fees play a crucial role in that effort. For fire fighters and emergency medical services employees, regular, updated, and high-quality training is imperative to protect their safety and to ensure that fire fighters and emergency medical services employees are capable of protecting the citizens they serve. The NFPA recommends minimum training and education requirements for fire fighters, and the NFPA further recommends that fire fighters train "on a regular basis but not less than annually." NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1500: STANDARD ON FIRE DEPARTMENT OCCUPATIONAL SAFETY AND HEALTH PROGRAM, ch. 5.3.3 (2018 ed. 2017) [hereinafter NFPA 1500].

With the resources provided by fair share fees, IAFF local affiliates are better able to prioritize these

training standards in their collective bargaining efforts. IAFF Local 2, in Chicago, Illinois, for example, has negotiated employer-provided training programs that are informed by a joint "training committee," which makes recommendations to the Fire Commissioner. Similarly, with the benefit of fair share fees, IAFF Local 742, in Evanston, Illinois, has negotiated for the adoption of NFPA standards for all training instructors and for all live fire training. Further, Local 742 bargained for the establishment of a joint safety committee, which must review and approve all mandatory training courses conducted by the department. Removing fair share agreements for these local affiliates and others like them around the country would not only undercut their ability to negotiate for these important safety provisions, but also their ability to effectively participate in joint safety and training committees and related efforts.

ii. Improvements to Personal Protective Equipment, Fire Equipment, and Apparatus to Safeguard All Fire Fighters and the Public.

Another significant collective bargaining priority funded by fire fighter unions is obtaining and maintaining the proper personal protective equipment (PPE). These unions often devote their resources to bargaining for higher quality PPE and for regular PPE cleanings, a priority that benefits all public safety employees. Proper PPE that complies with NFPA standards is of paramount concern to fire fighters in order to provide protection from hazardous exposures. For example, NFPA 1851 provides that fire departments should provide the means to have PPE cleaned and decontaminated. NATIONAL FIRE

PROTECTION ASSOCIATION, NFPA 1851: STANDARD ON SELECTION, CARE, AND MAINTENANCE OF PROTECTIVE ENSEMBLES FOR STRUCTURAL FIRE FIGHTING AND PROXIMITY FIRE FIGHTING, ch. 7.1.1 (2014 ed. 2013). Soiled or contaminated gear is hazardous to fire fighters because these contaminants may be flammable, toxic, or carcinogenic, which cause health problems in the long term, such as cancer. Coupled with this risk, contaminated PPE may also have reduced protective qualities. *Id.* at A.7.1.1.

Fair share fees play an important role in providing departments the resources not only to negotiate for NFPA-compliant equipment, but to police that compliance as well. For example, funded in part by fair share fees, IAFF Local 23, in East St. Louis, Illinois, has successfully bargained for all department-provided equipment to meet NFPA standards. Likewise, in Aurora, Illinois, IAFF Local 99, with the benefit of fair share fees, has also negotiated for NFPA-compliant turnout gear. Importantly, Local 99 has also bargained for the establishment of "safety sub-committees," which are responsible for periodically inspecting equipment and making recommendations for improvements and hazard abatement to the fire department.

Adequately funded IAFF affiliates also bargain for health and safety improvements to fire equipment and apparatus to better protect fire fighters. These improvements include hearing loss prevention programs. Excessive noise is one of the many hazards that fire fighters are exposed to on the job, and the main sources of noise include fire sirens, alarms, communication devices, audio equipment, engine pumps, rotary and chain saws, ventilation fans, and pneumatic tools used in emergency

ventilation and extrication. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, WORKPLACE SOLUTIONS: PROMOTING HEARING HEALTH AMONG FIRE FIGHTERS, Publication No. 2013-142 (May 2013) (hereinafter PROMOTING HEARING HEALTH).

Fire fighting activities often result in fire fighters being exposed to relatively continuous noise levels, and after being repeatedly exposed to excessive noise levels, fire fighters are at a dangerously high risk of developing occupational hearing loss. *Id.*; Stefanos N. Kales, et al., *Firefighters' Hearing: A Comparison With Population Databases From the International Standards Organization*, 43 J. OF OCCUPATIONAL AND ENVTL. MED. 7, 650 (July 2001) (hereinafter *Firefighters' Hearing*). Fire fighters tend to lose their hearing at an accelerated rate compared to the general population. *Firefighters' Hearing*, supra, at 650. Fire fighter hearing loss is particularly harmful because many of the tasks performed by fire fighters depend on their hearing ability. It is nearly impossible to see in a smoke-filled environment, and fire fighters are trained to listen for moans and cries when conducting a rescue search. Fire fighters must listen to and respond to radio communications and listen for the warning sound from an air horn that signals fire fighters to immediately leave a building due to imminent danger. Hearing loss, therefore, "can literally be a life-and-death situation" for fire fighters. Randy L. Tubbs, *Noise and Hearing Loss in Firefighting*, 10 OCCUPATIONAL MED.: STATE OF THE ART REVIEWS 843, 844 (Oct.-Dec. 1995).

NIOSH therefore recommends that fire departments limit noise emission when purchasing new equipment and train fire fighters about harmful noise levels from fire fighting tasks and equipment,

the effects of noise exposure, hearing loss, and appropriate hearing protection devices. PROMOTING HEARING HEALTH, supra. One IAFF affiliate that collects fair share fees, IAFF Local 2881, which represents employees of the California Department of Forestry and Fire Protection (CAL FIRE), negotiated for hearing protection/ communications systems on all new fire apparatus, dozer transports, and crew carrying vehicles to better protect their members' hearing.

iii. Specialized Equipment and Training for Specialty Areas, such as Wildfire Response.

One bargaining priority that has demonstrated its extreme importance in recent months is negotiation for specialized equipment and training procedures for employees tasked with emergency response in specialty areas, such as wildland fires. In October of 2017, a rash of wildfires in Northern California culminated in the most destructive wildfires in California's history, burning over 5,000 homes and hundreds of thousands of acres and claiming a death toll of over 40 victims. Fire fighters combatting these fires worked continuously for days on end, across conditions and terrain far removed from the typical structure fire. Then, in December of 2017, another wildfire erupted in Southern California, quickly expanding to the largest wildfire in California's history. Fire fighters are still working to suppress the massive blaze even as this brief is filed. Fortunately, negotiating for the equipment and training necessary to safely respond to incidents such as the California wildfires has been a critical bargaining issue for fire fighter unions in the area for years.

IAFF Local 2881, on behalf of CAL FIRE, with the aid of agency fees, successfully negotiated for specialized, department-provided field equipment defined in the Government Services Administration's Wildland Catalogue, including belts, packs, harnesses, and canteens. One recent study published by the NFPA identified addressing barriers "to obtaining full, up-to-date wildland [Personal Protective Equipment] assemblies for every wildland firefighter" as a critical area of focus in improving wildfire preparation and response proficiency. Hylton J.G. Haynes & Rachel S. Madsen, *Wildland/Urban Interface: Fire Department Wildfire Preparedness and Readiness Capabilities* (Jan. 2017), http://www.nfpa.org/News-and-Research/Firestatistics-and-reports/Fire-statistics/The-fire-service/Administration/Wildland-Urban-Interface.

Training beyond core, structural fire fighting proficiencies is also crucial to improving wildfire protection. *Id.* Local 2881 has negotiated for reimbursement of expenses not only for maintaining their required forestry licenses and for satisfactorily completing department required training, but also for completing additional, non-required training. Likewise, IAFF Local 798, in San Francisco, has negotiated a provision that permits its members (and their non-member coworkers) to be reimbursed for non-mandatory courses and training. Similarly, in Illinois, IAFF Local 3970, which represents the West Chicago Fire District, has negotiated an annual tuition reimbursement program for optional fire service or emergency medical services instruction, in addition to reimbursement for the training required by the district.

These provisions—negotiated with the support of fair share fees—permit both IAFF members and non-members alike to improve their safety and suppression skills in keeping with the latest practices, which often go beyond the basic training offered by their employers.

Beyond wildland fire training, other types of specialized training can expand vital services that fire fighters and paramedics provide their communities as well. For example, training in specialty areas like Hazmat, technical rescue, and response to terrorism, mass casualties, and other uncommon emergency incidents are not necessarily required by law, and are frequently the subject of collective bargaining, *but only where unions have the resources to devote to those issues.*

iv. Enhanced Health and Welfare Benefits, Annual Medical Examinations, and Employee Wellness Programs for All Fire Fighters.

Another collective bargaining goal, achievable with agency fees, is negotiating for annual medical examinations administered through employee wellness programs. A fire fighter's work entails high levels of physical exertion, uncontrolled environmental exposures, and psychological stress from observed intense human suffering. Practically every emergency situation encountered by a fire fighter has the potential for exposure to carcinogenic agents. Alarmingly, approximately 60 percent of line-of-duty deaths of IAFF members result from occupational cancer. Many line-of-duty deaths also result from heart attacks or strokes, and fire fighters have one of the highest rates of on-the-job heart

attack deaths among all occupations. Stefanos N. Kales, *Emergency Duties and Deaths from Heart Disease among Firefighters in the United States*, 356 New Eng. J. Med. 1207, 1208 (Mar. 22, 2007). The NFPA found that in 2017, 38 percent of fire fighters who died while on duty in the United States died from sudden cardiac death. Rita F. Fahy, Paul R. LeBlanc, and Joseph L. Molis, *NFPA's Firefighter Fatalities in the United States – 2016* (June 2017), http://www.nfpa.org/News-and-Research/Fire-statistics-and-reports/Fire-statistics/The-fire-service/Fatalities-and-injuries/Firefighter-fatalities-in-the-United-States.

Annual medical exams allow fire fighters/paramedics to maintain a high level of job performance and services to American communities. These exams, however, should screen for the unique risks and health conditions that reduce the ability of fire fighters to safely perform their jobs. *See* NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1582: STANDARD ON COMPREHENSIVE OCCUPATIONAL MEDICAL PROGRAM FOR FIRE DEPARTMENTS, ch. 7 (2018 ed. 2017); NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1583: STANDARD ON HEALTH-RELATED FITNESS PROGRAMS FOR FIRE DEPARTMENT MEMBERS (2015 ed. 2015); NFPA 1500, supra, at ch. 11.1.3. In the IAFF's experience, annual exams save more fire fighter lives than many other preventative measures by providing early detection and treatment of health conditions proven to be related to the fire fighting profession, which in turn allows fire fighters to have longer, healthier careers.

IAFF affiliates often devote their limited financial resources to negotiate for focused wellness programs that assist all employees. One study confirmed, "[d]espite recommendations that all firefighters receive periodic, occupational medical examinations, the fire service is failing to provide adequate medical programs to many U.S. firefighters." Stefanos N. Kales, et al, *Firefighters and on-duty deaths from coronary heart disease: a case control study*, ENVTL. HEALTH: A GLOBAL ACCESS SCIENCE SOURCE, Nov. 6, 2003, at 11.

Fire fighter unions with fair share agreements have better resources to negotiate with the employer for these programs to the benefit of all employees they represent. For example, in 2003, IAFF Local 1619 in Prince George's County, Maryland negotiated a comprehensive wellness and fitness program. Several years after implementation of the program, IAFF Local 1619 and the County saw a comprehensive return on the investment in positive performance data and added more components to the wellness program.

IAFF Local 99, in Aurora, Illinois, also supported by fair share fees, has negotiated for a number of similar health-related benefits for its members and their non-member coworkers, including annual physical examinations. Likewise, IAFF Local 742, in Evanston, Illinois, which benefits from a fair share fee agreement, has been able to bargain for a health and wellness program that adopts NFPA 1582 guidance, and provides for periodic medical examinations, including electrocardiogram and/or exercise stress tests.

Similarly, IAFF Local 22, in Philadelphia, which collects fair share fees, obtained through the

collective bargaining process an employee wellness fitness program, where all bargaining unit employees will receive a physical examination once every two years, have hearing conservation testing, and a fitness program. IAFF Local 2240 in Corvallis, Oregon, which collects fair share fees, also collectively bargained for medical evaluations for fire fighters in accordance with NFPA 1582 and at no cost to the employee. This is, again, an important and potentially life-saving benefit protecting all bargaining unit employees, regardless of union membership.

Additionally, IAFF Local 798 in San Francisco, California, which receives fair share fees, has a section in its collective bargaining agreement providing for health care screenings and vaccinations paid for by the City, including the Hepatitis B vaccine and Hepatitis C screenings, prostate, breast, and kidney and bladder cancer screenings.

With the funding derived from agency fees, *all* fire fighters in the bargaining units benefit greatly from these health and wellness programs.

B. Prohibiting Fair Share Fees Would Reduce Safety, Health, and Welfare Protections for Fire Fighters, Harming the Communities They Serve, Contrary to Essential Government Interests.

Adequate resources and fair funding are crucial for public safety unions to properly perform their required representational duties that better protect the lives and welfare of all personnel, regardless of

union membership, as illustrated by the collective bargaining priorities outlined above. Removing fair share fees, therefore, will reduce the safety and proficiency of emergency services, thereby harming the public, contrary to critical government interests expressed by state and local legislatures.

i. Collective Bargaining Requires the Expenditure of Much Time and Money, Which Benefits All Members of the Bargaining Unit.

For collective bargaining to be meaningful, "a government wishing to bargain with an exclusive representative" requires "a viable counterpart," which in turn requires that "a union . . . receive adequate funding." *Harris v. Quinn*, 134 S. Ct. 2618, 2656 (2014) (Kagan, J., dissenting). Agency fees thus play an important role in supporting and maintaining a stable collective bargaining system where the union serves as the exclusive representative of all employees. *See United States v. United Foods*, 533 U.S. 405, 414 (2001) ("To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another . . . ."). Especially in the important area of fire protection and rescue services, states and local governments have a compelling interest in allowing for agency fee arrangements, to support the collective bargaining efforts on behalf of both members and their non-member coworkers, who undeniably benefit from the union's efforts in collective bargaining, contract administration, and grievance representation.

As the exclusive representative, public unions have the legal duty of fair representation to non-members in the bargaining unit, and need fair share fees to

adequately fund that representation. *See Abood*, 431 U.S. at 221-22 (non-members "obtain[] benefits of union representation that necessarily accrue to all employees"); *see also Harris*, 134 S. Ct. at 2637 n.18 ("[T]he best argument that can be mounted in support of *Abood* is based on the fact that a union, in serving as the exclusive representative of all the employees in a bargaining unit, is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so."). Beyond necessity, basic principles of fairness demand that the unions receive agency fees in order to sustain their efforts as the exclusive representative of all employees.

As this Court recognized in *Abood*, collective bargaining "often entail[s] expenditure of much time and money." *Abood*, 431 U.S. at 221 ("The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones."). Typically, the parties do not meet at the bargaining table just a few times and reach a quick agreement; collective bargaining negotiations are usually a prolonged process that can sometimes take years.

Additionally, this process almost always requires public safety unions to hire attorneys, experts, economists, and professional negotiators at great cost to the union to match the resources expended and experts put forth by public employers. *See Abood*, 431 U.S. at 221. Most importantly, non-union members benefit greatly when IAFF affiliates obtain significant, but non-controversial, protections such as adequate staffing, education, training, equipment, and other health and safety measures, which are

overwhelmingly favored by all fire fighters, regardless of union affiliation. If unions are not able to adequately and fairly fund collective bargaining, then they will not be able to secure many of these protections for the employees they represent.

The costs of processing grievances and going to arbitration are steep as well. Unions like IAFF affiliates typically must pay for attorneys, share in paying for an arbitrator and other costs associated with arbitration hearings, and expend much time to ensure that grievances are properly processed. This is hardly a small burden for unions. Moreover, despite the tremendous time commitment and financial cost of grievance handling, public safety unions frequently represent non-members in discipline or termination grievances because of their obligations as exclusive representatives.

Those costly efforts, in monitoring and enforcing the collective bargaining agreement, benefit *all* members of the bargaining unit. For example, if a union wins a contract interpretation grievance with respect to overtime pay, all employees, members and non-member coworkers alike, benefit from a properly enforced contract. For disciplinary grievances, all bargaining unit employees benefit from the proper enforcement of a contract's "just cause" provision. In fact, in the IAFF's experience, pursuit of these grievances reduces the frequency of arbitrary or improper discipline for *all* employees, not just for the individual grievant.

The use of "union time" is another absolute necessity for public unions to properly negotiate and administer collective bargaining contracts. Consistent with public unions' duty of fair representation and the interest of public employers in

maintaining a cooperative relationship with the union, devoting union time to both bargaining and administrative issues benefits all. This is especially true with respect to the safe and efficient performance of fire protection and emergency medical services.

Moreover, union time fosters the fair and reasonable administration of the collective bargaining agreement that is essential to workplace harmony, cohesion, and morale. This is particularly important in the sphere of public safety officials, who literally depend on union cooperation and loyalty when facing life-threatening situations on a daily basis. Stability in collective bargaining is therefore of paramount importance in the public safety realm because of the dangerous nature of the work, and courts have recognized a heightened government interest in securing discipline, efficiency, and morale in organizations such as fire departments. *See, e.g., Anderson v. Burke County*, 239 F.3d 1216, 1222 (11th Cir. 2001).

ii. Prohibiting Fair Share Fees Will Harm Public Safety.

Without fair share fees to provide much needed financial support to public unions, these bargaining and administrative efforts would suffer, harming public safety. Indeed, studies show that in collective bargaining states where unions are properly funded with dues and fair share fees, the rate of worker deaths and injuries is substantially lower than in right-to-work states. For example, the University of Michigan conducted a notable study comparing the rate of fatalities for construction employees in right-to-work states (with no fair share fees) and in non-right-to-work states, and found that the fatality rate

is significantly higher in right-to-work states. In fact, the rate of industry fatalities is 40 percent higher in right-to-work states. ROLAND ZULLO, UNIV. OF MICH. INST. FOR RESEARCH ON LAB., EMP., AND THE ECON., RIGHT-TO-WORK LAWS AND FATALITIES IN CONSTRUCTION 6 (Mar. 2011).

The study found that "the positive effect that unions have on reducing fatalities appears to be stronger in states without [right-to-work] laws" and recognized that unions in right-to-work states "have fewer resources to devote to safety training and accident prevention." *Id.* at 5, 11. A study on construction industry work is an appropriate comparator to fire fighting because both occupations experience high rates of worker injuries and fatalities, and devote substantial collective bargaining efforts to improving employee health and safety. With the financial support of fair share fees removed, these unions would have no choice but to scale back costly bargaining and administrative efforts, damaging their ability to negotiate for and support the many important bargaining priorities outlined above.

These collective bargaining interests are therefore vital to both union members and non-members alike. Fire fighter unions' ability to fund and negotiate for proposals that bolster the safety of fire fighters and emergency medical services personnel benefits all those employees, regardless of whether they are union members. Therefore, fair share fees are an essential component of the existing collective bargaining structure, which encourages a strong and productive relationship between the employer and public safety unions and also clearly results in better protections for the health and welfare of fire fighter

and EMS personnel, as well as the public. Overturning *Abood* would thus produce disastrous consequences, causing both public safety employees and their communities to be less safe.

II. The Collection of Fair Share Fees Is Constitutional.

Abood has been settled precedent for more than 40 years, and the Court has repeatedly reaffirmed and refined the bedrock First Amendment principles it articulated in its subsequent decisions. *See Locke v. Karass*, 555 U.S. 207, 214 (2009). In upholding fair share fees as consistent with the First Amendment, the Court has accorded great weight to the long-standing principle of exclusive union representation, and the policy decision of a state to "establish [exclusive representation] for local government units." *Abood*, 431 U.S. at 223.

In *Abood*, the Court correctly recognized that "the designation of a union as exclusive representative" inherently "carries with it great responsibilities." *Id.* at 221. As an exclusive representative, "the union is obliged 'fairly and equitably to represent all employees . . . union and nonunion,' within the relevant unit." *Id.* (quoting *Machinists v. Street*, 367 U.S. 740, 761 (1961)). Justice Scalia, in an opinion joined by Justice Kennedy in all but one part, aptly described the rationale underpinning *Abood*, which remains true today: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment and dissenting in part).

The Court's reasoning in upholding fair share fees as consistent with the First Amendment rests on two fundamental principles. First, the Court recognized that "it would promote peaceful labor relations" to allow for fair share agreements "requiring employees who obtain the benefit of union representation to share its cost." *Abood*, 431 U.S. at 219; *see also Locke*, 555 U.S. at 213. Second, the Court determined that requiring all bargaining unit employees, regardless of union membership, to pay their fair share of the union's collective bargaining expenditures "distribute[s] fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation." 431 U.S. at 222; *see also Locke*, 555 U.S. at 213.

As further explained in Justice Scalia's opinion in *Lehnert*, "[w]hat is distinctive, however, about the 'free riders' who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Id.* at 556. Importantly, a union's apolitical role in serving the interests of the non-member employees of the bargaining unit also exceeds those duties that are explicitly required by statute. As set out above, fire fighter and emergency responder unions support a number of vital but non-mandatory functions, such as participation in safety and training committees. Under an overly restrictive view of Justice Scalia's proposed test in *Lehnert*, these essential functions—which benefit all bargaining unit members, as well as

the general public—could be critically starved of resources.

Abood therefore strikes the appropriate *balance* with respect to the First Amendment. Under the fair share fee system established in *Abood*, union members are not forced to subsidize the collective bargaining costs for non-members who receive the same benefits of union representation, and non-members are not forced to pay the union "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, 431 U.S. at 235. Justice Scalia underscored the appropriate balance struck in *Abood*: "Our First Amendment jurisprudence . . . recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other." *Lehnert*, 500 U.S. at 556.

In asking the Court to overturn *Abood*, Petitioner argues that collective bargaining involves policy and political issues no different than those involved in lobbying and political advocacy. Pet. Br. 10-18. This is not a novel contention, and Petitioner offers no circumstances or newly-found policy considerations that warrant disturbing the *Abood* precedent on these grounds. Petitioner also conveniently disregards the fact that the Court has thoroughly considered and dispensed with this argument in *Abood*, *Lehnert*, and other decisions. *Abood*, 431 U.S. at 231; *Lehnert*, 500 U.S. at 521-22.

The *Lehnert* opinion reinforced the *Abood* precedent by further elaborating on the obvious differences between collective bargaining and

political advocacy that make required payments to the former constitutional and to the latter unconstitutional. First, unlike contract negotiations between a public employer and a union, legislatures and the media "are public fora open to all." *Lehnert*, 500 U.S. at 521. Moreover, a union engages in collective bargaining pursuant to statutory authority, and unions generally have no equivalent authority or duty with respect to lobbying. *See id.* at 558-59. In addition, "unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views." *Id.* at 521. This proposition rings especially true with respect to fire fighters, emergency medical services employees, and other first responders' desire for adequate staffing, equipment, training, and other health and safety measures, as these priorities are hardly controversial, and there are few if any dissenters within bargaining units when it comes to the personal well-being of these employees and the welfare of the community.

The Court in *Lehnert* further determined that the principles underpinning *Abood*—labor peace and preventing free riders—do not apply in the political advocacy and lobbying context. For instance, the Court noted that "it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities." *Lehnert*, 500 U.S. at 521. In addition, "the so-called 'free-rider' concern" does not apply "where lobbying extends beyond the effectuation of a collective-bargaining agreement. The balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has

ramifications that extend into diverse aspects of an employee's life." *Id.*

Despite Petitioner's empty assertions to the contrary, the Court's decisions following *Abood* in the last several decades have repeatedly reaffirmed and refined the holding in *Abood* to ensure that First Amendment principles are properly interpreted.[6] In each of the agency fee cases decided by this Court from *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), through *Locke v. Karass*, 555 U.S. 207 (2009), the Court squarely upheld the rule in *Abood* as a "general First Amendment principle" that "[t]he First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment." *Locke*, 555 U.S. at 213. In addition, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and subsequent cases, the Court established robust procedures to "adequately protect[] the basic distinction drawn in *Abood*," between chargeable collective bargaining activities and non-chargeable political activities. 475 U.S. at 302; *see also Ellis*, 466 U.S. 435 (1984); *Lehnert*, 500 U.S. 507 (1991); *Locke*, 555 U.S. 207 (2009). These well-considered decisions ensure that

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[6] *Abood* is also a foundational case in this Court's First Amendment jurisprudence regarding financial support beyond the agency fee context, and overturning *Abood* will also have the unsettling effect of undermining precedent applicable in other contexts. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) (relying on *Abood* to uphold mandatory fees charged by state bar associations).

non-members' First Amendment rights are adequately safeguarded with respect to fair share fees.

III. Significant Reliance Interests by Fire Fighter Unions and the Emergency First Responders They Represent Require *Abood* to Be Upheld.

Despite Petitioner's blanket assertion that no individual or entity has a valid reliance interest in *Abood*," Pet. Br. 32, the IAFF has significant reliance interests in *Abood* and the system of collective bargaining and fair share fees upheld in that decision. Public employers and public employees have freely negotiated and entered into "not tens or hundreds, but thousands of contracts between unions and governments across the Nation" containing agency fee agreements in reliance on *Abood*. *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting).

Petitioner, however, somehow believes that overturning *Abood* would not interfere with the existing collective bargaining system and resulting labor agreements. Pet. Br. 32. This assertion betrays a fundamental lack of understanding about how the collective bargaining process works.

To begin with, many contracts contain union security clauses, which require non-members to pay fair share fees and allow for employer payroll deductions of union dues and fair share fees from bargaining unit workers. Each of these contracts would have to be reopened and re-negotiated, at great time and expense to the affected unions, which in turn will need to consult with lawyers to navigate the legal complexities of a post-*Abood* landscape. Moreover, in many cases, public sector unions have

bargained away important benefits or protections to secure agency fee agreements, and they will not be able to revisit those provisions until the current contract has expired. This imbalance would not only disrupt stable labor/management relations, it would cause an immediate, palpable inequity for unions across the nation.

Public safety unions also rely on fair share fees to negotiate, administer, and enforce contracts, including contracts currently in effect, as well as to process grievances. If *Abood* is overturned, IAFF affiliates will experience a sudden and substantial financial shortfall, and they will have to immediately modify their already-established budgets and re-determine their priorities to accommodate free-riders. These unions will have fewer resources for collective bargaining, and they will have to make tough choices regarding what they can and cannot afford. Funds earmarked for contract negotiations, grievances, arbitration, and other representational obligations will all be on the chopping block. This will unquestionably affect priorities at the bargaining table and contract enforcement. Important grievances for members and non-members that would otherwise have been backed by union resources will go unsupported. Bargaining issues—like additional training and protective equipment for uncommon emergency events—will be triaged and left on the bargaining room floor.

Make no mistake—this will negatively impact *all* public safety employees as well as the public they protect. It is difficult to overstate the resentment and damage to morale that would result. Preventing

this disruption to the public safety workplace represents a shared, compelling interest for public safety employees, the IAFF affiliates that represent them, government employers, and the public at large.

Moreover, without fair share fees, fire fighter unions and their members would still be obligated to cover the collective bargaining costs for non-members, *which unfairly burdens union members and significantly reduces the value of their contributions to the union*—especially due to the diminished ability of the union to provide protections to the bargaining unit—and thus leads to "inequity" between members and non-members. *See Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in judgment and dissenting in part) ("nonunion members . . . in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to *go out of its way* to benefit").

Furthermore, public employees will have a substantial incentive to free ride off the benefits obtained by the union, even if they support the union's efforts. Petitioner mistakenly argues that in circumstances where a majority of bargaining unit members support having a union, it can naturally be presumed that a high percentage of these employees will become union members and willingly pay union dues. Pet. Br. 40-43. As Justice Kagan rightfully points out in her dissent to *Harris*, "not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain their support." 134 S. Ct. at 2656.

Overturning *Abood* would completely dismantle the successful collective bargaining structure, enacted by governments, that serves the vital interest of "promoting labor peace." *Lehnert*, 550 U.S. at 520. Public employers and public safety unions have established long-standing and productive collective bargaining relationships with each other and have come to rely on the exclusive representation scheme, with fair share fees, as a cornerstone for stability in labor relations. Fire fighters depend on this stability, boosting morale, benefitting the entire bargaining unit, and improving the fire protection and rescue services provided to the community. Disturbing this perfectly functional system that has been in place for four decades would seriously undermine the capacity of the IAFF affiliates to adequately protect and represent fire fighters and emergency medical services employees, consistent with the best interests of state and local governments and the public.

Finally, this Court has repeatedly affirmed that "*[s]tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision" with the undesirable result of "dislodg[ing] settled rights and expectations or requir[ing] an extensive legislative response." *Hilton v. S. Carolina Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). Here, the states and local governments have established collective bargaining systems authorizing fair share fees based on the general First Amendment principles articulated in *Abood*. Public employers and public safety employees have entered into multi-year labor contracts containing fair share fee provisions in reliance on *Abood* and state collective bargaining law. Accordingly, the IAFF and its local affiliates respectfully submit that *stare decisis*

principles fully support the conclusion that the well-reasoned and balanced precedent established in *Abood* and its progeny should not be disturbed by a decision in this case, especially because of the unsettling labor relations consequences that would surely result.

In sum, the Court should reject Petitioner's attempt to dismantle a labor relations system that has functioned properly for more than 40 years, and affirm the well-balanced rule set out in *Abood*. To do otherwise would deprive IAFF-affiliated public safety unions of the support that state and local legislatures have determined they need to carry out their critical public functions. Fundamental fairness demands that non-union members in the bargaining unit fairly share the cost of the benefits they receive through the legally mandated efforts of the union, and in the absence of any material change in circumstances, the Court should uphold the just and longstanding rule established in *Abood*.

CONCLUSION

For the reasons set forth above, the IAFF and its affiliates respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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